ties, that the presumption that the tenant was a trespasser, arising from the notices, might be rebutted. The Supreme Court, in holding this error, observed: "Such contract was not necessary to the maintenance of the action; it is not necessarily founded upon a specific contract, written or oral, but upon the use of the premises. The occupant may be, in fact, a trespasser, but the owner of the tenement may waive the trespass and recover in assumpsit, and it does not lie with the tort feasor to defeat him by interposing his own wrong. To tell the jury, therefore, that they must find some new contract between the parties, in order to rebut the presumption arising from the notices, was error, for the presumption might well be rebutted by the subsequent acts of the parties.

B. E. BLACK.

St. Louis.

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## *Court of Chancery of New Jersey.*

### IN RE PERRINE, &c.

A deaf mute who does not understand any matter of business, and cannot be made to understand it, except it may be such as is of the most simple character, and who has no comprehension of business matters, obviously cannot manage his own affairs, and consequently is incapable of selecting an agent to transact them.

ON motion to set aside inquisition.

*A. S. Appelget*, for the motion.

The opinion of the court was delivered by

RUNYON, Ch.—The inquisition in this case is signed by nineteen of the twenty-four jurors. They find that the alleged lunatic "is of sound mind, and is capable of controlling her property by her own selection of a proper person to act for her." The other five certify that she is "not of sufficient understanding to enable her to manage her property." She is about sixty-five years old, and has never been married. The commissioners have made a report concerning her condition. They say that she is not an idiot or lunatic, in the popular sense of the words; that she has been a deaf mute ever since she was two or three years old; that she is ignorant, having never been taught any language, whether spoken or of signs; that she can neither read nor write, and cannot express to others her understanding, if any she have, of any business transaction; that she cannot be made to comprehend a business transaction, except, perhaps, a very ordinary one, involving no more money than a dollar or two; that she has learned to fetch and carry, and to do common, everyday housework,—that is, she can sweep, wash, cook an ordinary meal, &c.; that it is possible, by rude gestures, to com-

municate to her a desire that she should do such work; that she has never managed her property, nor any part thereof, and that the acting trustee of her estate has never informed her of the amount, character or income of her property, and that it is doubtful whether she can be so informed; that she has always been cared for by her near relatives, with whom she has lived—by her mother for about fifty years, and until her mother's death—after her mother's death, by her unmarried sister, so long as that sister lived, and since that sister's death, by her married sister, with whom she now lives. Application is made to set aside the inquisition on the ground that the finding is contrary to the evidence.

Lord HALE says, that a man deaf and dumb from his birth, is, in presumption of law, an idiot; and the rather, because he has no possibility to understand what is forbidden by law to be done, or under what penalties. He also says, that if it can appear that the man has the use of understanding, which, he adds, many of that condition discover by signs, to a very great measure, then he may be tried, and suffer judgment and execution, though great caution is to be used therein: Hale P. C. 34.

In *Brower* v. *Fisher*, 4 Johns. Ch. 441, Chancellor KENT said, speaking of such persons: "Perhaps, after all, the presumption, in the first instance, is that every such person is incompetent. It is a reasonable presumption, in order to insure protection and prevent fraud, and is founded on the notorious fact, that the want of hearing and speech exceedingly cramps the powers, and limits the range of the mind. The failure of the organs requisite for general intercourse and communion with mankind, oppresses the understanding,—*affigat humo divinæ particulam auræ*. A special examination to repel the inference of mental imbecility, seems always to have been required."

A person born deaf and dumb, but not blind, is not an idiot; Collin. Lun. 4, sect. 5; Shelf. Lun. 4; *Brower* v. *Fisher*, *supra*. But, in order to warrant this court in interfering in behalf of a person to protect him against the consequences of his own mental incompetency, it is not necessary that he should be an idiot or a lunatic. It is enough, if, from any cause, whether by age, disease, affliction or intemperance, he has become incapable of managing his own affairs: 2 Mad. 732; 1 Bl. Com. 304; *Ridgeway* v. *Darwin*, 8 Ves. 65; *Conover's Case*, 28 N. J. Eq. 330; *Lawrence's Case*, Id. 331.

In *Gibson* v. *Jeyes*, 6 Ves. 267, 273, Lord ELDON says that,

upon a commission in the nature of a writ *de lunatico inquirendo*, it is not necessary to establish lunacy, but it is sufficient that the party is incapable of managing his own affairs.

It was so held by Chancellor KENT, in *Re Barker*, 2 Johns. Ch. 232, where the person who was the subject of the inquiry had become incapacitated by old age. Whether persons born deaf and dumb are to be treated judicially as persons mentally incompetent to manage their affairs, must depend upon the evidence they are able to give of the possession of capacity.

In *Dickenson* v. *Blisset*, 1 Dick. 268, a person who was born deaf and dumb, and who had attained to her majority, applied for possession of her real estate, and for an assignment to her of her personal property. Lord Chancellor HARDWICKE, having put questions to her in writing, to which she gave sensible answers in writing, thereupon granted the application,

In *Brower* v. *Fisher*, 4 Johns. Ch. 441, above cited, a commission was issued to inquire as to the mental competency of such a person.

In the case in hand, the jury found that Miss Perrine was of sound mind, and capable of controlling her property by her own selection of a proper person to act for her. But if the proof was, as the commissioners certify, that she is incapable of understanding the business, or even of receiving any communication upon the subject, and therefore does not understand, and cannot be made to understand, what the necessities of the management of her estate demand, or what an agent is, or what his duties are, or, in other words, if the proof was, as they certify, that she does not understand, and cannot be made to understand, any matter of business, except it may be such as are of the most simple character; if she has no comprehension of business matters,—it is obvious that she is not capable of managing her affairs, and the inquisition cannot be sustained. The jury does not find that she is herself competent to manage her business, but that she is capable of controlling it by an agent of her own selection. But if she cannot be made to understand what the business is, how can she select an agent to manage it? The inquisition will be set aside.

The cases involving the capacity of deaf mutes are not numerous, and hence the principal case is worthy of careful examination.

In *Christmas* v. *Mitchell*, 3 Ired. Eq. 541, Mr. Justice NASH, in considering this question, used the following language: "Formerly, one who was born deaf and dumb was considered, in presumption of law, an idiot: 1 Hale P. C. 34. This presumption of law, if it still exists, like every other presumption, yields

to proof to the contrary, and Lord HARDWICKE decreed an estate to one born deaf and dumb, upon his answering properly questions put to him in writing: *Dickenson* v. *Blisset*, 1 Dick. 268. But science and benevolence have together rectified the public mind as to such persons; and it is no longer in common understanding any evidence that an individual is an idiot, because deprived from his birth of the power of speech and hearing. No one who has witnessed the wonders worked in modern times, in giving instruction to unfortunates of this class, would, after hearing the testimony in this case, doubt that Leonidas Christmas might have been instructed, not only in the mechanic arts, but that his mind might have been enlightened to receive the high moral obligations of civil life, and the still more profound truths of our holy religion. We are constrained then to say, that he does not come within the exception contained in the statutes"—of limitation as being *non compos mentis*. See, also, *Potts* v. *House*, 6 Ga. 356; *Reynolds* v. *Reynolds*, 1 Spears 256; *Barnett* v. *Barnett*, 1 Jones Eq. 222.

The subject is also somewhat considered, with reference to the will of an aged testator whose hearing was somewhat affected, and whose sight was very seriously impaired, in *Weir* v. *Fitzgerald*, 2 Bradf. 67, by BRADFORD, surrogate, as follows: "By the Roman law no person could make a valid will, who lacked one of the principal senses; such, for example, as were deaf and dumb, or blind. Blackstone lays this down of those born deaf, dumb and blind, who, he says, 'as they have always wanted the common inlets of understanding, are incapable of having *animum testandi*, and their testaments are therefore void:' 2 Com. 497. The rule was of necessity qualified by the reason of it, which was a presumed want of capacity. Persons born deaf and dumb could not make wills on the supposition of insufficient capacity: '*Surdus, mutus, testamentum facere non passunt*' (Dig. L. xxviii., tit. 1, §§ 6, 7); but subsequently it was allowed, where the defects were not congenital, and there existed sufficient testamentary capacity: Cod. lib. vi., tit. 22, § 10. A blind man might make a nuncupative will by declaring the same before seven witnesses; but he could not make a testament in writing unless it was read to him and acknowledged by him to be his will before witnesses: Cod. lib. vi., tit. 22, § 8; Inst. lib. 2, tit. 12, §§ 3, 4; Dig. lib. xxxvii., tit. 3. This was first permitted by a decree of Justin, and continued to be the rule of the civil law: '*Caecus, autem, non potest facere testamentum, nisi per observationem, quam lex divi Justini, patris nostri, introduxit.*'

"It has not, however, prevailed in England, nor been incorporated in any of the statutes relative to wills. The object of requiring the will to be read to the blind man was doubtless to prevent fraud, the substitution of one instrument for another, and to secure evidence beyond the mere *factum* of the will, of the knowledge of the contents of the identical will by the testator. It has not been made a formal ceremonial by our statute in any case that the will should be read to the testator in the presence of the witnesses, though it is eminently proper so to do where the testator is blind or cannot read. The statute is satisfied by the subscription of the testator at the end of the will in the presence of two witnesses, or the acknowledgment of such subscription; the testamentary declaration of the testator; and the signature by the witnesses of their names at the end of the will at the request of the testator. These forms are necessary; but, even when satisfied by the evidence, do not always entitle the will to be admitted to proof. Something more is necessary to establish the validity of the will in cases where from the infirmities of the testator, his impaired capacity, or the circumstances attending the transaction, the usual inference cannot be drawn from the mere

formal execution. Additional evidence is therefore required that the testator's mind accompanied the will, that he knew what he was executing, and was cognisant of the provisions of the will. I think that is all that ought to be required in the proof of the will of a blind person. But it is not essential it should be established by the subscribing witnesses. It may be supplied *aliunde*. As subscribing witnesses all that it is necessary they should prove is that concerning which they witnessed and which the statute requires. This satisfies the statute; and the additional evidence to which I have referred as proper in certain cases may be afforded by other persons."

"The point presented is not entirely new. In *Moore* v. *Paine*, 2 Cas. temp. Lee 595, the deceased was blind, and only one of the three subscribing witnesses proved the instructions, the reading of the will to the testatrix, and her approbation of it. The will was sustained on the ground that only one witness was necessary. In *Longchamp* v. *Fish*, 5 B. & P. 415, before the Common Pleas, the precise question came up. That was a will of lands, which, by the statute, was required to be executed in the presence of and subscribed by three witnesses. The will was not read over in the presence of the three attesting witnesses. The testator was blind; had dictated the will to one Davis, who read it over to him, took it away, got it copied, brought it back fairly copied; two months after the testator made an alteration in it; and then it was executed. It was contended that the will ought to have been read in the presence of the testator by one, at least, of the three attesting witnesses. The court, however, ruled in favor of the will." See also *Fincham* v. *Edwards*, 3 Curtis 63.

The leading case of *Brower* v. *Fisher*, 4 Johns. Ch. 441, decided by Chancellor KENT in 1820, and cited in the principal case, and the cases already cited, make it clear that a person is not now to be considered an idiot from the mere circumstances of his being deaf and dumb.

If, however, there is still a presumption of some degree of incapacity, civil or criminal, in one who is deaf and dumb, it is quite certain that it may be rebutted by evidence. See, besides the cases already cited, *Commonwealth* v. *Hill*, 14 Mass. 207; *Morrison* v. *Lennard*, 3 C. & P. 127; *Rushton's Case*, 1 Leach's Cr. L. 455; *Rex* v. *Pritchard*, 7 C. & P. 303; *Rex* v. *Dyson*, Id. 305; *State* v. *Harris*, 8 Jones Law 140; *Brown* v. *Brown*, 3 Conn. 303.

Such presumption of *quasi* incapacity, however, if it still exists, is at most a weak presumption; and, perhaps, it may now be said that there is, at least in the United States, no presumption of a defective understanding in persons deaf and dumb. See *Christmas* v. *Mitchell*, and *Potts* v. *House*, *supra*.

But, in order to insure protection and prevent fraud, proof would probably be required that such person was capable of comprehending what he was doing in executing the instrument. See *Weir* v. *Fitzgerald*, *supra*. To this extent, perhaps, there may be a *quasi* presumption of incapacity; or, rather the lack of the usual presumption of capacity resulting from the formal execution of the instrument; but this is believed to be the limit of the doctrine. See 1 Redf. on Wills, 3d ed. 53, *et seq.* and notes; 1 Gr. Ev. sect. 366.

Coming now to the more particular consideration of the principal case and applying the principles already stated, there can be no doubt of its correctness. The disability in this case seems to have been much greater than in any of the cases above cited, and to have held that the deaf mute could, in this case, select an agent to manage business, the nature of which she could not be made to understand, would be to stultify the law.

M. D. EWELL.